in a cause. But the proof furnished by the case is most conclusive that the special statements of the affidavit were required solely on account of the continuance.

Although the counsel for the United States considered the motion for an attachmest merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. This continuance was to arrest the ordinary course of justice, and therefore the court required a special affidavit, shewing the materiality of the testimony before this continuance could be granted. Prima facie evidence could not apply to the case, and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance.

COLDEN proceeded. " The present application is to put off the cause on account of the absence of witnesses, whose testimony the defendant alledges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed, by the affidavit which Thave just read, the points to which he expects the witnesses who have been summoned will testify.

" If the court cannot, or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postpon-

" Or if it appears to the court that the matter disclosed by the affidavit might not now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will so much of the letter as relates to the conpostpone the trial on account of the absence of witnesses whom they cannot compel to appear; and of whose voluntary attendance there is too much reason to despair, or on account of the absence of witnesses who if they were before the and the act of Congress has been cited in court, could not be heard on the trial."

This argument states unequivocally the purpose for which a special affidavit was

The counsel for the U. S. considered Mr. Sandford said " It was decided by the court yesterday that it was incumbent on the defendant in order to entitle himself to a postponement of the trial, on account of the absence of these witnesses, to shew in what respect they are material for his debut that the particular facts expected from the witnesses must be disclosed, in order that the court might, upon those facts, judge of the propriety of granting the postponement."-(Page 27)

The court frequently treated the subject so as to show the opinion that the spe-cial affidavit was required only on account been orally communicated, the person of the continuance; but what is conclusive to whom the communications were made on this point is, that after deciding the tes- could not have excused himself from detimony of the witnesses to be such as could not be offered to the jury, Judge Patterson was of opinion that a rule to shew cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witnesses to be the recollection of the witness. shewn on a motion, the success of which did not in his opinion in any degree depend on that materiality; and which he implied by this motion and by such a degranted after deciding the testimony to be cision of it as the law is believed to resuch as the jury ought not to hear. It is quire. then most apparent that the opinion of Judge Patterson has been misunderstood, answered by the declaration that this and that no inference can possibly be court feels many, perhaps peculiar modrawn from it opposed to the principle tives, for manifesting as guarded a reswhich has been laid down by the court, pect for the chief magistrate of the uni-That principle will therefore be applied to on, as is compatible with its official duthe present motion.

Gen. Wilkinson, which was referred to in appellation than the term respect. the message of the president to congress. The application of that letter to the case, is shewn, by the terms in which the communication was made. It is a statement of the conduct of the accused, made by the person who is declared to be the essential witness against him. The order for pro-

ducing this letter is opposed : 1st : Because it is not material to the

defence. It is a principle universally acknowledged that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. Might I be permitted to utter one senti-If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say, for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations therefore, constitute a mass of testimony which a party has a right to obtain by way of precaution, and the positive necessity of which, can only be decided at the trial.

was heard from the bar, insinuating that country with Spain, which will be imporgave the countenance of the court to suspicions, affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony

would be the feelings of the prosecutor, cuments have often been produced in the be said and no doubt will be said, and may witness completely exculpating himself, be arrested in his attempt to prove what the same witness had said upon a former that such an attempt could not be permitted, because it would imply a suspicion on the court that the witness had not spoble an interposition but one opinion would or meditated by the accused. be formed

The 2d objection is, that the letter contains matter which ought not to be disclosed.

That there may be matter, the production of which the court would not require, is certain; but that in a capital cour may take cognizance. case, the accused night not, in some form. to have the benefit of it, if it was really essential to his defence, is a position which the court would very reluctantly deny. It ought not not to be believed, that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances presents a delicate question, the dissu-sion of which, it is hoped, will never be rene dered necessary in the scountry. At present it need only be said, that the question does not occur at this time. There is certainly nothing before the court which shows, that the letter in question contains any matter, the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, if it be given in evidence if the witnesses were be not immediately and essentially appliduct of the accused, can be a subject of delicacy with the President. Every thing of this kind, however, will have its due consideration on the return of the subpoena.

2dly, It has been alledged that a copy may be received instead of the original, support of this proposition.

This argument pre-supposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the President are most uthe subject in the same light. After exhibiting an affidavit for the purpose of shewing that the witnesses could not probably possess any material information, Mr. Sandford said "I was decided by the purpose." The copy would not be superior to the original, and the original inself. riginal itself would not be admitted, if denied, without proof that it was in the hand writing of the witness. Suppose the case put at the bar, of an indictment on this le ter for a libel, and on its production should it appear not to be in the hand writing of the person indicted. Would its being defence. It was the opinion of the court posited in the department of state make that the general affidavit in common form it his writing or subject him to the would not be sufficient for this purpose; consequence of having written it? Certainly not. For the purpose then of showing the letter to have been written by a particular person, the original must be proiced and a copy could not be admitted.

On the confidental nature of this letter, much has been said at the bar, and authorities have been produced, which aptailing them so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity, the only difference produced by that circumstance is, that the contents of the paper must be proved by the paper itself, not by

Much has been said about the disrespect to the chief magistrate, which is

These observations will be very truly ties. To go beyond these would exhibit The first paper required is the letter of a conduct which would dese ve some ther

> It is not for the court to anticipate the event of the present prosecution, should it terminate as is expected on the part of the United States. All those who are concerned in it would certainly regret that a paper which the accused believed to be essential to his defence, which may for aught that now appears, be essential, had been withheld from him. I will not say that this circumstance would in any degree tarnish the reputation of the government but I will say that it would justly tarnish the reputation of the court which had given its sanction to its being withheld .ment with respect to myself, it would be to deplore most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter is more questionable. It is alledged that it most probably communi-It is with some surprize an argument cates orders showing the situation of this the award of a subpoens on this ground, tant on the misdemeanor. If it contains matter not essential to the defence and the disclosure is unpleasant to the Executive, it certainly ought not to be disclosed This is a point which will appear on the return.

The demand of the orders which have been issued, and which have been, as is alledged, published in the Natchez Gasuch as is stated in this case. Wh zette, is by no means unusual. Such do and overwhelm the accused. All this may

if in this case the accused should produce courts of the U. States and the courts of be a very considerable help to Col. Burr. Eugland. If they contain matter interestand the attorney for the U. States should ing to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. occasion, by a declaration from the bench, If they do not and are material, they may be exhibited.

It is said they cannot be material because they cannot justify any unlawful reken the truth? Respecting so unjustifia- sistance which may have been employed

> Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material because they might tend to weaken the endeavor to connect such overt act with any overt act of which this

> The court, however, is rather inclined to the opinion that the subpæna in such case ought to be directed to the head of the department in whose custody the orders are, and the court must suppose that the letter of the secretary of the navy which has been stated by the attorney for the U. S. to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

> The affidavit on which the motion is grounded has not been noticed. It is beheved that such a subpoena as is asked ought to issue if there exist any .cason for supposing that the testimony may be material and ought to be admitted. It is only because the subpoena is addressed to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was defired for the real purposes of defence, and not for such as this court will forever discoun-

Debate on the motion for a writ of subfroena duces tecum continued.

THURSDAY, June 11, 1807. MR. HAY began with addressing the court as follows

I AM happy the court has recommended to the counsel on both sides to adhere more strictly to the subjects in debate. Their admonition will be followed by me, and I wish they would cause it be followed by others. I regret indeed that it was not made somewhat sooner. Perhaps, if it had been, we might have been spared the pain of hearing many remarks as unauthorized in point of principle and fact as they are irrelevant; remarks which, as a public prosecutor, as a friend of my country, and a supporter of its constitution, government and laws, I heard with surprize and regret, and with a sentiment which I will not name. I will not imitate this example of my opponents, but endeavor to confine my observations exclusively to the question now in discussion. I am really doubtful however, whether I should not be departing in some degree from this declaration in noticing one argument used by the gentleman who last spoke, (Mr. Wicknam.) Language so strange, a charge so unjust, I hope, however, I may be permitted to repel

The gentleman with a tone of voice calculated to excite irritation, and intended for the multitude, charged us with conceding point after point! He insinuates that we have been catching at every thing to bear down the accused; that we inconsiderately contend for any doctrine however absurd which might have the effect of injuring him, and afterwards are obliged to abandon the ground we have too precipitately taken. I will ask if any occurrence has shewn that we are actuated by this spirit? No, sir. The gentleman knows the charge is unjust. But even if it had been true that we had made concessions, it ought to have been considered as a proof of our candor and liberality, in giving up ground as soon as we tho't it untenable, & not as a matter of reproach. But, sir, it is not cor-We have conceded no point that we ness because we always thought so. never clothed him with those attributes of divinity which gentlemen have accused us of ascribing to him. We know the President is but a man, though among the first of men; he is but a citizen, though the first of citizens. The President too knows that like the great Cato he ought to pay obedience to the laws of his country and obey the commands of its courts of justice. this we have uniformly admitted, but have denied, and deny now that a subhoena duces tecum ought to be issued to the Presi-

Mr. Hay moreover observed that the objection made the day be ore to the prisoner's right to make the motion in the present stage the prosecution was not waved; and that, in opposing the motion, he was influenced solely by a desire to keep the accused and his counsel within legal limits; because he had endeavored to procure for them the very evidence they requested-He proceeded to argue the question upon its merits.

It having been admitted that this was a motion addressed only to the discretion of the court, it followed that it ought to be granted only when substantial justice requiredit; that it is to be granted to a peron accused because his defence when properly conducted requires it. But the accused himself in this case does not say these papers are material in his defence. His affidavit is drawn with great caution. He only says that the papers may be material. This is nothing more than the mere expression of an opinion which may be correct or incorrect. Mr. Hay asked the counsel for Col. Burr, and more especially Mr. Martin, if in the course of their long experience they had ever known such an affidavit? Its language is unprecedented, designedly vague, and equivocal The letter may be material !- This may depend upon the use intended to be made of it. The object of demanding it may be to give his counsel an opportunity to speak as they have done before; to charge the government with illegal and barbarous

The affidavit is truly farcical, because from any thing expressed in it the letter of Gen. Wilkinson may, or may not be material. Suppose those words "or may not had been inserted would it then have been regarded? The absurdity would then have been to evident—And is it not the same thing in substance as it now stands? If such an affidavit as this is sufficient, and mere curiosity is to be indulged, the President might be required to produce all our csrrespondence with the Spaniards about our disputed territories; in short, all the papers of government would be laid open to the inspection of Burr. But the court ought not to issue process on speculation only; it ought not to subject the public officers, to inconvenience and the national archives to derangement, unless in a case where justice plainly requires it.

But the affidavit would not have been sufficient if he had said, what he dared not say, that the papers are material. It should appear how they are material. The nature of the evidence ought to be specially stated that the court may judge of it. Will the court rely on the judgment of the par-ty in this case? Misled as he is by his feelings, his judgment ought not to be trusted.

Even in ordinary cases the court will enquire as to the contents of papers on a motion for a continuance—which doctrine is recognized in 2 Bl. Rep 514. The same thing was done in the case of the U. S. vs. Smith and Ogden, in which almost as much clamor was excited as in this. There, the evidence of Mr. Madison and others was sworn to be material, but the court required a specification of its substance, and de-cided that it was not admissable. The papers required in the present case would probably be so decided, if they were here. I have a knowledge of the orders and think so with respect to them. The letter I know nothing about. Mr. Wickham's argument that the court did right in Smith and Ogden's case, because it was prima facie presumable that the evidence would not be admissable, turns against him here; for, certainly, it is prima facie presuma-ble that gen. Wilkinson's letter cannot make in Burr's favor, since the orders to intercept him on his passage to the seat of his empire were founded on the information received from that letter.

The cenduct of the gentlemen proves that they feel us to be right. Their involuntary conviction of this is evinced by their endeavoring to supply the defect in the affidavit, and to specify the purposes for which the papers are wanted. accused has not ventured to swear that they are material, but they assert it and attempt to shew it by argument.

First, as to the letter ;-Mr. Wickham says, that Wilkinson has written other letto other persons differing from this. We deny the fact. If it be true, why is it not sworn to? But suppose Gen. Wilkin-son had done so, what is the inference? Is his evidence before the Jury not to be regarded? It is strange indeed that the gentlemen say they have never seen this letter and only guess at its contents, yet say that letters containing different statements have been written! Surely such efforts as these are deplorable; for, whether the assertion be true or not, it is not known to

They next contend that the orders are material because they were illegal, arbitrary, unconstitutional, oppressive and unthat Burr's acts were merely acts of self-defence against tyranny and usurpation, and, of course, were justifiable.

Many strange positions have been laid down, but this is monstrous. Mr. Martin will excuse me for saying that I expected sounder doctrines from his age and experience. These principles were not le rat by him in Maryland, nor are they the doctrines of this place. Considering that he has come all the way from Maryland to enlighten us inferior lawyers of the Virginia bar by his great talents and erudition, I hoped he would not have advanced a doctrine which would have been abhorred c-President might be subpoenaed as a wit- the laws -- (see L. U. S. vol. 3, pa. 189.) and particularly to prevent enterprizes a gainst foreign nations in amity with the U. States; -- (ib. p. 92.) Yet it is contended, that his orders for such purposes are illegal, and may be resisted by force of arms! I will not say it is treason to advance or a misdemeanor to believe such doctrines; but deplorable is the cause which depends on such means for support.

Suppose, however, the President was misled; and that Mr. Burr was peaceably engaged in the project of settling Washita lands; will it be contended that he had a right to resist the President's orders to stop him? I say this would be treason. If Congress were to pass an arbitrary or oppressive act, but not unconstitutional, (such as the excise law for example,) it has been decided that an armed combination to resist it would be treason. course resistance to the execution of the statute under which the President was acting would be treason. The President receives information that a law of the U. S. about to be violated; he issues orders to enforce the law in the way prescribed by itself. Is not opposition by violence trea-Will the gentlemen, after seriously reflecting, still contend that Burr had a right to resist? This doctrine is not the growth of this country, nor is it the doctrine of the real friends of human liberty But this is a new-born zeal of some of the gentlemen in defence of the rights of man. No wonder, therefore, they are not so well acquainted with the subject as those, who on? that Burr had a right to resist an illegal order; (which I utterly deny;) will the court issue a subpoena founded on that supposition? Will you inselt the executive by saying that its orders were illegal, and ought on that account to be produced as evidence? especially after you have your-

was a public document, the right to a copy of it was admitted, unless there should be something in it which, in the opinion of the President, the public good forbade to be disclosed. But he denied that the letter was a public paper merely because addressed to the President of the United States. It had been observed that the President had made it so by referring to it in his message to Congress. If this argument is correct, only so much is public as is referred (Here Mr. Hay read a part of the President's communication to Congress.) He contended that there might have been a great deal more in that letter than what related to the discovery of Burr's plans, that there might have been information of a private nature, accounts of the disposition of the people in the Western Country towards the government, and Gen Wilkins son's thoughts on many important subjects. Will the court say that all these things shall be made known? If a copy was received, such parts only could be extracted as ought to be made; but if the original should be granted, the whole would be seen and inspected by the court, by the counsel on both sides, at by the public. He said that the court ought also to be satisfied that the President has the custody of this letter. The subpoena ought to be addressed to the person who has it in his custody. It is said to be a public document: if so, it is in the office of the Secretary of State (see L. U.S. 1 vol. 32 & 110.

It is absurd then as well as indecorous to summon the President of the United States to bring a paper which he has not. The same observations applied to the copies of The original orders were lodged with the Secretary of State, and copies were sent by him to the Secretaries of War, and of the Navy. To the Secretary of State, therefore, the subpoena ought to be issued, if at all.

The court ought also to be satisfied that the Party could not obtain without a motion, the copies of the orders now required. The accused ought therefore to shew that he has demanded copies: but he has not done so. He asked indeed, a copy from the Secretary of the Navy; and because he refused, process is to be issued against the President of the United States, though he was never applied to.

The Chief Just ce asked Mr Hay what was the legal way of getting the paper which the Secretary of the Navy refused? He answered, "by application to the Sccretary of State for copies."

Mr. Hay made many other observations which the limits of this sketch will not permit us to insert. In opposition to the arany recollection of his letter if a copy only was produced, he said it was mere presumption and a preposterous supposition; that it would be immaterial whether he denied it or not, since the copy is evidence by the act of Congress He vindicated Gen. Wilkinson from the attacks which were wantonly made upon him, saying it was the policy of Col. Burr and his counsel to endeavor to tear down his character before he arrived, and that every principle of propriety was violated by such conduct. He asked if it was right that a man high in the confidence of government and of his country, should be thus attacked ! and declared he should be sorry for the character of his fellow-citizens if the a suse lavished on him by the accused should have the slightest effect on the event of the trial.

Mr. M'Rae said it was plainly to be inferred from the President's message to Congress, that the letter in question was confidential. It appears that the Presisident furnished extracts of some of the letters he received relative to Col. Burr. His not furnishing Congress with a copy of this or of any part of it is presumptive evidence that it ought not to be made public.

Mr. Randolph,-May it please your

honors-To the observations I shall make, I have no preface or apology. I beg leave to appropriate to argument the which falls to my lot in the discussion of ven in the most turbulent period of the French revolution, by the Jacobins of 1794! sir, that to day there would have been ever maintained. We admitted that the the militia to suppress combinations against took place vesterday; but since the atresurrection of the discussion which torney on the part of the prosecution has thought proper to introduce it, I shall not shrink from it but meet it. I make no appeal to the multitude, it is not my desire to excite the sympathy or rouse improperly the feelings of the by-standers. simply state the proposition. Why is Col. Burr not entitled to ask the court to issue a subpoena for the production of those pa-Is Col. Burr not now before the court? Is he not here upon his recognizance? Has he not been here a considerable time on the tinter book of expectation, that when General Wilkinson, that great accomplisher of all things arrives, that an indictment will be preferred against him? But has he on that account resigned the rights of defence? be tongue tied and hands tied without the privilege of defending himself? He cannot be properly defended without the production of these papers, and on that account he now demands the interposition of the court; but say the counsel for the prosecution, he is not entitled to this privilege until the grand jury find a true bill and an indictment is preferred. Why did we not hear this objection when the grand jury were empannelled? It was proved yesterday by several law authorities ; it was proved sir by invariable practice, & it was proved by a wish of all our souls, that the ccused ought to have this privilege from the very commencement of the prosecution-Wherefore then sir, are we to be vexed and perplexed again with this objecti-on? Wherefore do they say, it is premahave always, and always will contend for ture on the part of my client? I see a them. But admit their inference correct; corps of worthies around me, to justify corps of worthies around me, to justify what I say-Every man I assert, who appears on the grounds of a recognizance, stands in the same condition as one on his trial-Are you to shut a man out for evidence, because he is only accused, because his life only can be forfeited? There is a self said that there was probable cause for this sentiment which, however, acrecable harsiness in this-There is a severity in committing Col. Burr on the charge of a it may be with the principles of lay. have to thank God, has never been Mr. Hay proceeded to argue another practice. The principles to which I have point that the court ought not only to be sa-tisfied that the letter was material, but truth and the sacred books of the scripthat it was a public paper. He said, if it ture. No bill is yet found, and I trust none